ASHGATE PUBLISHING LTD

Law, Society and Community

Deleted: Word files for proofing ...

Chapter 13

The Sociology of *The Politics of Jurisprudence*

Richard Nobles and David Schiff

In much of his work, Roger Cotterrell has questioned and lamented the tendency of legal philosophy and sociology of law to remain closed to each other, and of each to be insufficiently adapted to the study of legal practice (e.g. Cotterrell 1975, 1983, 1993, 2002, 2014a). Legal philosophy, with its concerns with what is essential to law, has a tendency to develop concepts that generalize at a level of abstraction which robs it of any obvious relevance to the day to day practices of lawyers, or the information rich empirical studies of the sociology of law (Cotterrell 1989: 2–3). Sociology of law can be criticized in turn for insufficient attention to concepts of law, with a resulting tendency to generate information organized through partial concepts appropriate to the researched sub-field of legal study,[1] which do not build any consensus on the general nature of law as social formation. And there is also a tendency for sociology of law to seek to distance itself from the discourse of lawyers and to focus not on what is said in law by its participants but on the behaviour of those involved in law, and on the causes and effects of particular laws. If, as he has claimed (agreeing here with many leading legal philosophers) law involves the institutionalized generation of doctrine (1983: 243, 251–2), then the study of this doctrine, and the role that it plays within law, should not be excluded from sociological study. He has argued that there needs to be a closer synthesis of the approaches of legal philosophy and the sociology of law, directed to the study of legal practice. This combined approach should generate knowledge of legal practice which is not accessible via each separate discipline and, on a normative note, could improve the work of jurists, those persons who not only study legal systems, but who take some responsibility for their continued existence and enhanced performance (Cotterrell, 2013a, or 2013b). His sense of what might constitute enhancement is associated with ideas

[1] Roger observes that sociological concepts of law exhibit more variety and less sophistication than those generated within normative legal theory. He attributes this in part to the fact that, within the latter, these concepts are an end in themselves, whilst within sociological approaches the conceptualization of law is simply a preliminary stage in the organization of empirical study (Cotterrell 1983).

of community. The hoped for outcome of this improved understanding is that law will provide a form of regulation that is fit for various kinds of communities (instrumental, affective, traditional and value based) and be better able to reconcile the conflicts between these communities.[2]

In this chapter we focus on one of Roger's best known contributions to jurisprudence: *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (Cotterrell 1989, 2003, hereafter '*PoJ*'). In doing this, we are allowing ourselves, as two of his colleagues at Queen Mary, to continue a discussion which has been ongoing in many forms since we first joined him as colleagues in 2006. Since 2000, we have been exploring the potential of systems theory to increase our understanding of jurisprudence (see especially 2006). Thus we have shared Roger's belief that a sociological approach to jurisprudence could be a profitable addition to a field dominated by philosophical approaches. But Roger has expressed considerable reservation as to whether systems theory offers an appropriate way forward, questioning the focus of the theory on law's growth as an abstract system, to the neglect of the 'particular forces and interests that give rise to law's development, inspire its interpretations and guarantee its authority' (Cotterrell 2003: 250).[3] The contrasting approach, offered within *PoJ*, is that 'normative legal theory's abstractions should be seen, in part, as a response to professional and political needs of people (especially lawyers) with specific interests and concerns' (2003: 250).

If *PoJ* were claimed to be a synthesis of philosophical approaches and sociological theory, we could present a straightforward comparison between systems theory and whatever sociological approach Roger has adopted and adapted. But the aims of *PoJ* are more limited. The book offers a critical introduction for undergraduate law students to the theories commonly encountered within a course on jurisprudence.[4] As such, it contains some excellent exposition and discussion of a kind that would be quite at home in a more traditional legal philosophy text. In undertaking this task, *PoJ* expressly eschews dealing with sociologically informed empirical legal theory, in favour of a

[2] 'Normative legal theory must recognise social diversity by explaining law in terms of the regulatory requirements of different communities' (Cotterrell 2003: 257).

[3] See also Cotterrell 2001.

[4] See Cotterrell 1989, Preface.

discussion of the contribution made by legal philosophy (Cotterrell 2003: 3). All of this suggests that it would not be fair or appropriate to use this book to stimulate a debate on how sociological methods and theories might inform our understanding of the issues typically discussed within legal philosophy. But neither is our aim here to criticize *PoJ* for its limitations, namely what it does not attempt to do. Rather, it is to use the material and approaches contained in *PoJ* to consider what a systems theory approach to the issues tackled by legal philosophy offers. We wish to build on those aspects of *PoJ* which offer the beginnings of a synthesis between legal philosophy and the sociology of law. Within *PoJ*, the overall aim or 'organising framework' is that the 'patchwork of philosophical views of the nature of law contained in modern Anglo–American jurisprudence can be understood as a response to social and political change: but a response shaped substantially by perceived problems arising in the professionalisation of legal practice' (Cotterrell 2003: viii). Using some of the material and discussion contained in *PoJ* we wish to utilize systems theory to explore the nature of such links. First we will consider how these links are presented within *PoJ*, concentrating on Roger's first substantive chapter, his exploration of the common law tradition.[5]

1. A Sociology of the Common Law Tradition

This first substantive chapter and approach to understanding the general nature of law discussed in *PoJ* is about the common law tradition; it is in many ways the most sociological chapter in the book and the one that is most closely connected to legal practice. On the other hand, it is also the chapter which is least connected to legal philosophy, or indeed any theory, for the practice of the common law did not deal in theories as such, but in claims. The common law was claimed to be the expression of different things – community, custom, reason, morality, justice and God's will (see Lobban 1991: 59). It was claimed by its practitioners to be unwritten, even when the decisions through which it was formed were recorded in law reports. These claims have some logical interconnection so, for example, the claim that the source of law lies in community, custom, morality or God's will supports the claim

[5] This chapter is called 'The theory of common law', which may be slightly misleading since it explores the failure of common lawyers to develop a theory which could adequately explain the common law. Indeed, Postema (2002) believes that common lawyers never articulated a full-fledged philosophical theory of law, only a 'distinctive approach to understanding the nature of law and legal reasoning' (at 599).

that the law is unwritten, as there is no text which both embodies these sources and expresses the content of the common law. The decisions of particular judges are described not as law in themselves, but as attempts to identify the law, which lies in these sources. The manner in which these various claims operate has echoes of classical natural law, since unjust laws (incorrect identifications of justice) are not, therefore, really law – in the sense that they can be discarded in favour of the real or higher law to be found through these sources. At the same time, the decisions of judges can also be described as the best evidence of that law, for these various sources have been cited to, and considered by, those judges on the occasions when they have been asked to provide a new remedy for what is claimed to be a pre-existing wrong.

Whilst these various elements of common law reasoning have a logical connection, it is hard to call them a 'theory', at least by comparison with something like Aquinas' *Summa Theologica* (in the 1959 edition), which presents a systematic exposition of the sources of law, the relationships between them and the implications of those relationships for everyday legal problems. In place of theory, particularly when it took the form of philosophical speculation, common lawyers tended to stress the practical nature of common law reasoning, terming it 'artificial reason', and claiming that the sense of what it required in any particular dispute could only be acquired through being an experienced legal practitioner.[6]

The discourse of common lawyers prior to the reforms of the nineteenth century poses a challenge to any claim that legal practice needs to be closely connected to legal philosophy. Indeed, one can go further, and point to the resistance of this discourse to the criticisms of legal philosophers, or even empirical evidence. Thomas Hobbes challenged the common lawyers' claim that the common law represented a form of reasoning that could only be known through long practical experience, counter-claiming that the reason within law could be gained by a student within a few months (1681/1971: 56). And when Bentham (1843: 7, 13, 48–9, 63) insisted that the common law was the law of 'Judge & Co.', he was not asserting anything which required systematic empirical enquiry, he was simply pointing out that the only factual bases for the common law were the decisions of judges,

[6] The classic statement of this is that of Coke 1628: 97b, discussed by Postema 2002: 593–5.

whatever claims those judges might make as to their sources of inspiration.[7] How does one account for this state of affairs? Just as one may ask what legal philosophy contributes to legal practice, one may also ask what this a-theoretical collection of claims achieved.

One answer of course is that these claims served the interests of the legal profession. Any claim that legal discourse is something different from other forms of discourse, which requires particular knowledge, gained through experience, supports claims for professionalism. Such claims, if accepted, also legitimate the power that professionals exercise, and the fees that they can charge. And in this the common law tradition, as a non-theory, is not so very different from many of the theories which followed. Legal positivism, with its attempts to present law as a science (Austin 1832/1955; Kelsen 1967), or modern natural law with its various attempts to present law as a restriction on the arbitrariness of power (Fuller 1964; Dworkin 1986) can both be understood as theoretical contributions to the legitimacy claims of the legal profession. But whilst this may say something about the implications of these particular legal philosophies, or even allow us to speculate about the political aims of the respective authors,[8] what does this tell us about the relationship between legal philosophy as an enterprise and legal practice? For whilst some philosophical approaches paint the legal profession in a positive light, others decidedly do not. The 'Jurisprudence of Difference', Derrida inspired deconstruction and the sceptical branch of the 'Realist' movement, all challenge the claims of today's legal profession. And in doing this, they are not so very different from Hobbes and Bentham, with their criticisms of the discourse of the common lawyers. Even legal positivism, which can be understood as a theory which supports modern legal practice, has its origins in writings which offered no such supportive role to then existing legal practice.

In *PoJ* the reader is invited to consider a two-way relationship between legal practice and legal philosophy. Firstly, legal philosophy alters as legal practices change. This could be expected to

[7] For Bentham, the sources of judicial decisions, or at least judicial desire not to reform the laws and procedures which had resulted from them, were explicable in terms of professional self-interest: to put money into the pockets of the judges, or the lawyers, or the other members of the firm 'Judge & Co'.

[8] Inviting a consideration of psychological factors, as one finds in the many books of essays representing a 'progressive critique' of law, such as Kairys 1998.

occur in any branch of applied philosophy, for example, one would expect the philosophy of science to be stimulated by changes in scientific practices.[9] If there is any controversy in this claim, it arises from arguments over the parameters of what is legal practice. Practices claimed to be legal by some theories are excluded by others. However, since most modern legal philosophies accept that their theories must be applicable to nation state legal systems and their accompanying practices,[10] *PoJ* is on fairly firm ground in claiming that changes in legal philosophy occur in response to changes which occur to the nature of state legal systems, and it is these kinds of legal systems that are the object of most of the philosophies covered by the book. So, for example, it is plausible to suggest that Hart's stress on power conferring rules (Hart 1961) reflects the changing experience of state law in modern society, with more individuals experiencing more changes to their legal statuses on a regular basis than before, and state power being delegated to more officials through ever more, and ever more complex, legal rules.[11] So it makes some (sociological) sense to claim that when Hart stresses the importance of power conferring rules, he is not really pointing to a feature of law overlooked by prior theories, but to something that has a radically greater importance within modern legal practice than it did in earlier periods.[12]

[9] A view which adherents of naturalism would extend to philosophy generally: 'Naturalism in philosophy is always *first a methodological* view to the effect that philosophical theorizing should be continuous with empirical inquiry in the sciences' (Leiter 2007: 34).

[10] Raz 2009: 105, for example, opines that a theory that did not include clear cases of state law within what it recognized as law would not be an adequate theory.

[11] As Maine (1861) famously put it, there has been a change in the basis of modern law from one organized around status, to one organized through contracts, an observation that captures the increased importance of power conferring rules within private ordering, but neglects their equally growing role as a means to distribute state power.

[12] Cotterrell (2003: 94) argues that this change in legal practice had already been recognised by Austin and that Hart's desire to identify a role for power conferring rules separately from their relationship to duty imposing ones was motivated by a '*political* concern' to stress law's facilitative functions. The problems for Hart, as an analytical philosopher, was that the change in legal practice which he sought to identify did not equate to an analytical distinction, as power conferring rules are always intertwined with duty imposing ones.

The second part of the philosophy/practice relationship is more problematic. In *PoJ* the claim that there is an important relationship between normative legal theory and legal practice is broken down into three questions.[13] What practical relevance in professional and political arenas of law does normative legal theory have? How does this relate to particular historical conditions? What assumptions about the nature of societies underlie these theories? One has to take care here that one does not reverse the phrasing of these questions, and return to the previous relationship. The relevance of legal practice to legal theory is demonstrable over and over again, as it provides any such theory with its object. One can subject such theories to a sociologically informed critical analysis, which includes a consideration of the historical conditions which produce both the legal practice that is being theorized, and the resultant legal theories. And one can also examine which assumptions about the nature of societies might inform legal practices, or the particular legal theories which such practices generate. And *PoJ* does all of this, at various points. But whilst all of this would make sociology relevant to legal theory, it does not address the three questions set out above, which focus on the relevance of normative legal theory to legal practice.

If these questions are treated as causal in nature, they are both difficult and easy to answer. It is relatively easy to point to the possibility that a particular theory portrays the legal profession in an attractive light, and then claim this makes that theory relevant in some meaningful way to legal practice. But it is much harder to point to any legal theory and show that, but for the existence of that theory, legal practice would not have developed in a particular way. *PoJ* itself contains a particularly stark example of this difference. Maine's historical school is discussed as an attempt to provide a theoretical basis on which to understand the evolution of law, and therefore something which could compensate for the absence of such a theory within the discourse of common lawyers. His works were widely read by lawyers, and are said to have had 'immense influence' (Cotterrell 2003: 45). But there is no specific evidence that they had any influence on legal practice. The most obvious route for their influence was their inclusion within professional legal education at the end of the nineteenth century,

[13] Cotterrell 2003: 12–13. The particular aspect of normative legal theory which is to be analysed in its relationship to legal practice is legal philosophy's concern with unity and system in law.

but their lack of relevance to legal practice is perhaps caught by the comments contained in a an early nutshell-type guide to Maine's *Ancient Law*¸ used by students who had to study this work in order to pass the professional examinations: 'In these books there is a great deal of writing that is absolutely useless to the student for examination purposes, and page after page has to be waded through in search for a criticism or theory … ' (Quoted by Cotterrell 2003: 47).

PoJ provides some evidence of legal theory influencing legal practice. One particular example (2003: 194) is Llewellyn's work on the draft commercial code. This code was clearly influenced by Realist views that doctrinal statements could be over general, and thus provide a poor guide (on both a normative and predictive level) to the resolution of disputes. Llewellyn aimed to identify principles that were more specific and appropriate within a narrower range of contexts than had been developed via the common law. And whilst important aspects of his work on the code were not enacted, some of it was. But such specific examples also point to the contingencies of the influence of theory on practice, and the difficulties of claiming that 'but for' a particular legal theory, a particular legal practice would not have occurred.

The relationship between legal theory and legal practice may be open to more sociological analysis if one moves from causal questions to functional ones. What function does legal theory play within legal practice? And in asking this question, can one do more than re-assert the claims that theory which portrays legal practice or the legal profession in an attractive light provides legitimacy? One way to approach this kind of question is to consider the work done by theoretical constructs within day to day legal practice. How, if at all, does the legal system make use of legal theory in its day to day operations?

It is here that we would wish to introduce systems theory, as developed by Niklas Luhmann.[14] For Roger, systems theory is 'not sociological enough' (2003: 250) focusing as it does on law as a system of communication, which he feels ignores the professional, political, organizational and ideological conditions that have made possible law's presentation as an autonomous system. There is no room here to debate this general accusation, except to say that systems theory does, we feel, no

[14] Particularly his last monograph devoted solely to law: Luhmann 2004.

such thing. Systems of communication operate at various levels. Society as a whole is a social system (Luhmann 1985) as are its functional sub-systems (see Luhmann 1982: 229–54), such as law or the economy. But so too are interactions (e.g. conversations) and organizations (Luhmann 2005). Thus there is no reason to believe that understanding society in terms of systems excludes professional bodies or other kinds of organizations. What of political or ideological questions and conditions? Tracing how systems exist and change requires one to focus on the operations that their communications execute, and the manner in which those operations change as the system's communications change. But this does not mean that the environment is ignored. For example, if one wished to consider the relationship between the legal and political system, one would track how each evolved in response to the other. To speak meaningfully of a 'relationship' between law and politics requires us to have a sense of their respective self-limitations: what, in each of them, allows them to have stable and on-going (as opposed to fleeting and contingent) reactions to each other.

One can use systems theory to analyze the role played by theory within legal practice. One can ask, along the lines of the first of the questions from *PoJ* set out above, what work such communications might do. What operations do they enable or facilitate that would otherwise have to occur in different ways through different communications? *PoJ* provides the beginnings of this kind of enquiry in the chapter on the common law. This chapter includes a quotation from Coke CJ, taken from *Calvin's Case* (1608):[15]

> … we are but of yesterday … our days upon the earth are but as a shadow in respect of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience … refined, which no one man (being of so short a time) albeit he had in his head the wisdom of all the men in the world … could ever have effected or attained unto. And therefore … no man ought to take upon him to be wiser than the laws.' (Cotterrell 2003: 24)

Roger does not criticize this statement as a mystification or ideological presentation of the common law, instead acknowledging it as an honest and direct statement of a set of assumptions that underpin the classical conception of common law judging: law is not made by judges but pre-exists their

[15] 7 Co Rep 1, 3.

decisions and is simply declared by them; it is unwritten, and lies in customs and the community at large; it is identified by judges via their powers of reason and experience, or wisdom. He notes that these assumptions amount to a paradox: the law is changed via the endless process of reaching judicial decisions, but at every point in this process the law is claimed to pre-exist and lie outside of the judicial decisions themselves. Even as the law is changed, it is asserted to be unchanging. Roger (2003: 28) presents this paradox as something that was less apparent earlier in the history of the common law, when the decisions of judges were not reported. It also had more empirical truth when the assizes first began in the twelfth century, when judges went out into communities and took evidence of local custom, only combining it into a 'common law' thought through their discussions amongst themselves on their return to Westminster.[16] But according to *PoJ* (2003: 29), the common law tradition 'backed itself into a corner' as empirical conditions offered less and less support to the assumptions of common law judging. And to the extent that judge-made law remains a feature of the legal system, this leaves judges without adequate authority for the decisions which they still have to reach. The remedy which he offers, towards the end of *PoJ*, is for the gap left by the common law approach to adjudication to be filled by a more sociologically informed legal theory, which can assist jurists to find legal solutions that are appropriate to, and thus representative of, the communities that generate legal disputes (2003: 254–66). This offered solution is not only relevant to the role of judges within the unitary and unified communities presupposed to exist within nation states. It would require the law to engage with the multiple communities that exist both within national state boundaries, and across them.[17] In making this suggestion, Roger is, in common with many of the legal theories which he discusses, reacting to the perceived inadequacies of lawyers' own accounts of their own practices.

What could systems theory add to the above analysis? In systems theory the kinds of general statement contained in the quote set out above by Coke, made in the course of a court judgement (rather than in a pamphlet, lecture or diaries) is a legal communication, and of a particular kind. It is

[16] See Baker 2002: Chapter 2 'Origins of the Common Law', Simpson 1986.

[17] In making these suggestions in the 2nd edition of *PoJ*, Roger is drawing on his own earlier writings on law and communities, most notably Cotterrell 1995, and predisposing himself towards his later writings on 'transnational law' (e.g. Cotterrell 2008, 2009).

an attempt, within the legal system, to describe the totality of the legal system. Where such communications occur within a social subsystem such as law, Luhmann calls them 'self-descriptions'.[18] There is more here than a change of terminology. The theory identifies a relationship between such self-descriptions and other communications within the same system. Within the legal system, communications apply the code legal/illegal to various states of affairs. As part of this process, the legal system generates communications which observe on the application of that code, identifying what it was about state of affairs X that made it legal, in contrast to state of affairs Y, which was coded illegal. These observations, within a system, upon that system's own applications of its code, are second order observations.[19] Such second order observations stabilize, but do not determine, future applications of the code. In the case of law, such observations are more commonly called doctrine – the constant attempt to present law as a non-arbitrary application of the legal code by generating reasons which distinguish what is legal from what is illegal. Doctrine reduces the possibilities of what can be recognized as a meaningful legal communication. In this sense, it stabilizes, but does not determine, what will be found to be illegal, or legal. The communications that constitute a system's secondary observations can be at a high or low level of generality. But those at the highest level, which attempt to describe the system as a unity, to itself, form self-descriptions. And just as law's second order observation stabilizes, but does not determine, what can be coded legal/illegal, self-descriptions have a similar role – stabilizing, but not determining. One might describe these second order observations as facilitating the making of further communications within a system, but this facilitation cannot be separated from their ability to limit what can be

[18] Luhmann 2004: chapter 11 'The Self-description of the Legal System', and more generally, Luhmann 2013: 167–349.

[19] 'While first order observation refers to *what* an observer observes, second order observation refers to *how* an observer observes' (Borch 2011: 57). Second order observation can be internal (self-observation) when the communications of a system observe on the system's own application of its own distinctions, or external (hetero-observation) when a system uses its communications to observe upon the communications of another system.

communicated. It is only by limiting the possible selection of what might connect next to any communication, which makes complex and technical forms of communication possible.[20]

This conceptual scheme focuses our attention, as Roger rightly observes in *PoJ*, on the internal operations of a system, and the possibilities that exist, at any moment, for further communication, including evolution of the system, which alter the possibilities of what can be communicated. He is critical of this: 'the system is portrayed as having a life of its own in some sense. The social context that gives it that apparent life remains only very faintly sketched. The particular forces and interests that give rise to law's development, inspire its interpretation and guarantee its authority remain vague in autopoiesis theory' (250).

Let us examine this criticism, in the context of *PoJ*'s discussion of the common law. What role is played, within law, by self-descriptions in the form set out above by Coke. Our observation is that they facilitate legal judgements within a legal system that faces changing social conditions, where the political system generates (relative to modern conditions) relatively small amounts of legislation. In this, as Roger notes in *PoJ*, the common law attribution of law to the customs of the community duplicated what on the continent was achieved by natural law (2003: 116). Within natural law, any local jurisdiction is, at best, an expression of a higher law. A local law that is unjust is not really a law and, as such, a judge who finds such a law to be unjust, is not legislating, or even changing the law, but simply identifying the law, and correcting an earlier misunderstanding of what the law truly is. In the case of the common law, by describing the law as a standard of right and wrong that lies within the community, common lawyers left law open to change in response to changing conditions. If a dispute revealed a new injustice, the common law would seek to provide a remedy. The sense of injustice which governed this process was not a utopian assessment of the whole social order, for that would open the law to forms of argument that would remove its ability to resolve disputes or support powerful interests. Instead common lawyers looked out on the world using the lenses of the common law (Cotterrell 2003: 32). When identifying a new wrong that needed a new remedy, they would

[20] ' … structure, whatever else it may be, consists in how permissible relations are constrained within the system … . Only by excluding almost all conceivable linkages can there be something like: "Would you give me a refill?" "You've forgotten to clean the back seat of the car!" or "Tomorrow at three at the movie theater ticket office!"' (Luhmann 1995: 283)

compare the claimed new wrong with whatever wrongs had previously been recognized by the common law. This is not simply a situation of filling in gaps. Wrongs which had not been recognized in past decisions could return to court in a situation where the urgency of the need for remedy had increased, or the distinction between this claim and recognized claims had decreased. In this situation, as the common law communicated to itself that the decisions of judges were simply the best evidence of law, and not the law itself, a judge who accepted a previously rejected claim as a wrong that needed a remedy was not making law, but only correcting an earlier mistaken identification of the law.

This functional analysis of the common law's self-description invites the question, why did this disappear from legal discourse. What changed? The answer given in *PoJ*, with which we would agree, is that the law changed; in particular, due to changes outside of the legal system, particularly in the political system. Parliament began to issue huge amounts of technical and specific legislation, especially in response to the demands of the new middle classes. This was experienced in the courts, and amongst the legal profession, as changes in the forms of legal argument. Prior to this expansion in the amount and nature of legislation, statutes were treated, like judges decisions, as remedies for wrongs, and evidence of the wrongs that they remedied.[21] They were regarded as inferior evidence to court decisions, but with a higher authority in the sense that they had, at least in the immediate aftermath of their passage, to be followed.[22] With the change in the nature of legislation, the self-observations which generated the common law self-description altered. So much of the law (the application of the code legal/illegal) was law for one reason alone – it was the intention of Parliament. This acceptance of authority was already present alongside the common law tradition, but with the change in the amount and nature of statute, authority, rather than the identification of community values, became the dominant basis for legal decisions. It became implausible to continue to claim that statutes are a remedy for an existing wrong lying within the community, when the overwhelming mass of legislation was seeking to change society. It also became difficult to use the existing law as a framework from which to identify principles or maxims, and in turn use these to identify particular

[21] The idea that Parliament provided remedies for existing wrongs, led to the recognition of those wrongs, like the decisions of judges, being communicated as declaration of standards that already existed within the community. (Stoner 1992: 37–8)

[22] An authority from which there was no appeal: McIllwain 1910.

examples of injustice, when so much of the law became detailed, specific, and self-evidently partisan. And when the dominant basis for legal argumentation took the form of an acknowledgement of the need to identify and give effect to the intention of Parliament, the self-description changed. What we would now call positivist self-descriptions replaced the common law tradition in England, whilst on the continent they replaced various forms of natural law self-descriptions.

This history, most of which is found in the *PoJ's* discussion of the common law tradition, would seem to suggest that law does, in very important ways, have a 'life of its own'. The self-description of the common law as the customs of the community, like the functionally equivalent natural law self-descriptions found on the continent, were a feature of law for hundreds of years. As such these self-descriptions cannot be attributed in any direct way to the incalculable number of events that occurred within law's environment during this period. But this does not mean that law was un-influenced by its environment. Rather, the self-description of law formed a significant aspect of law's reaction to, and evolution within, the rest of society. At a time when legislation was, by today's standards, relatively infrequent, the dominant way in which the rest of society sought to influence law's communications was by bringing claims to courts. Law responded to these claims by evolving its doctrines, and in the process, both generated and utilized its self-description as an expression of community values.

2. A Sociological Theory of Jurisprudence

In this section we wish to discuss what systems theory might offer to a discussion of legal theory more generally.The second edition of *PoJ* contains its own introduction to systems theory, which acknowledges that systems theory, with its acceptance that systems contain paradoxes, would echo post-modern theories' focus on the circularity and arbitrariness of the postulates which inform much legal philosophy.[23] Roger claims that 'theorists of autopoeisis' simply answer: 'True, but so what? This is how law is, and works, it does its job' (249). This statement, like the claim that the 'particular forces and interests that give rise to law's development, inspire its interpretation and guarantee its

[23] Luhmann insisted that his own theoretical writings sought to explain the modern. He did not acknowledge a separate stage of social development which was 'post-modern' (see specifically Luhmann 2000) but only the inadequacy of pre-modern concepts to explain modern conditions (see generally Luhmann 1998).

authority remain vague in autopoiesis theory' (250) had more truth at the time that the second edition of *PoJ* was published, than they do today. [24] As a theory of society, systems theory is necessarily abstract. But, like other sociological theories, the issue is not whether the general theory contains lots of information about social phenomena, but whether, in its application, it can generate concrete observations. Thus, for example, the concept of structural coupling,[25] or co-evolution,[26] which is Luhmann's answer to how closed systems interact with each other in stable and predictable ways, seems no more than a suggestive metaphor. But in our work on reporting of miscarriages of justice we have been able to use this concept to analyze and describe important aspects of the relationship between law and the mass media.[27] And in terms of organizing data, the recent work by Chris Thornhill, *A Sociology of Constitutions*, is a tour de force in its utilization of historical sources, and systems theory, to present the evolution of states and constitutions as a consequence of the increased power which became available to power holders through its expression in, and consequent restrictions by, law. These works,[28] like the above consideration of how the changing nature of statute triggered a change in the legal system's self-description, are not ignoring the forces that give rise to law's development and authority. On the contrary, they are using systems theory to organize complex data and increase our understanding of these forces. And what of the role played by paradox within

[24] Because, at least as far as English speakers are concerned, some of Luhmann's major works had not been published as translations.

[25] Structural coupling occurs when a system 'presupposes certain features of its environment on an ongoing basis and relies on them structurally … . the forms of structural coupling *reduce* and so *facilitate* influences of the [system's] environment on the system'. Luhmann 2004: 382, and generally with regard to the legal system's structural coupling with other systems, see ch.10. With regard to how this applies to society in general, its operational closure and structural coupling with its environment, see Luhmann 2012: 49–68.

[26] On co-evolution with law, see Teubner 1993: ch.4 'Blind Legal Evolution'.

[27] See Nobles and Schiff 2000, 2004. For a succinct statement of the nature of structural coupling between law and the mass media, see Nobles and Schiff 2013b. On the structural coupling between law and politics, and the general nature of structural coupling, see Nobles and Schiff 2013a, chs. 6 and 7.

[28] For a further selection, see Febbrajo and Harste 2013. There are numerous examples of the application of systems theory on the Continent, and especially in German academic literature where its presence is ever growing and its significance increasing.

systems theory?[29] Far from simply accepting that paradox occurs, systems theory directs us towards observation of how and when paradox occurs within systems, and what functions it plays.

Let us begin with the paradox which Roger identifies within the common law: that judges claim to identify a law which exists prior to the decision which establishes it as law. Systems theory has something more to offer here than simple acceptance of this. For a start, what it offers is a clearer idea of where the paradox is situated. This paradox lies within the legal system, in the communications used in adjudication. It does not lie in the beliefs or communications of judges as individuals. Judges are free to acknowledge, to themselves, that their decisions are acts of legislation, structured by their own political beliefs and commitments. They may even, when acting in non-judicial capacities, such as public lectures, admit to making law on this basis. But in their courts judges receive arguments that state what the law is, not what it ought to become, and their judgements follow the same form – they articulate what the law is.[30] In keeping with this form of communication, decisions that mark a break with previous articulations of the law are still applied retrospectively, as if the decision reached in the case had always been the law. And this paradox has, if anything hardened, with the change to more positivistic self-descriptions. When it comes to statutory interpretation, any change of interpretation, no matter how radical, is routinely taken to have always been the law from

[29] As an example of the crucial role of paradox within systems theory, see Luhmann 2013: 293–305, and within law(s) more generally, Perez and Teubner 2006.

[30] See Nobles and Schiff 2009 and 2013a: 147–63. The paradox is not removed on the rare and exceptional occasions when judges admit, even within the judgements that constitute their decisions, that their decisions represent new law. There are at least two reasons for this. Firstly, because the paradox remains present, but suppressed, on every occasion when no such admission is made and a decision is reached that is not simply an expression of the existing law. As such, no modern legal theorist except Dworkin (and he only during the period when he claimed that the communications of judges alluded to an omnipresent 'right answer') has denied that the paradox occurs within legal adjudication. The only issue that remains between legal theorists is how often this is the case, and on what basis, if any, it can sometimes not apply (i.e. when it is correct for judges to claim that their judgments merely apply existing law rather than create new law). The second reason, is that even on the rare occasions where judges admit in their judgements to be making law, this is still not presented in terms of a political decision or utilitarianism or efficiency, but on the basis that the decisions reached would be an extension of the present law, or a just solution in light of the context provided by accepted law.

the moment that the statute was brought into force. This is not because judges cannot see that changing the interpretation of a statute amounts to a change in the standards that will be applied in future, and therefore a change in the law. It is that the very communication that is routinely used to claim authority for the interpretation of law (giving effect to the intention of Parliament) provides no basis for putting temporal limitations on the operation of that interpretation.

The claim that this paradox lies within the legal system as a system of communication, and not in the minds of judges, or within the communications of other systems (such as legal philosophy as a sub-system of education) is related to another distinction that systems theory helps us to draw: the difference between what is external and what is internal to the legal system. We agree with Roger, that it is 'necessary to discard any simple distinction between legal insiders and outsiders, or participants in and observers of law' (2003: 258). Systems theory operates on the basis that there is not simply an inside and an outside to a system of communication. Firstly, a system creates itself through its own communications. But it does this through communications that refer both to itself, **and** its environment.[31] So, for example, when a legal system deals with claims, or evidence, it is recognizing a society that exists outside of itself. It does this with communications that identify the procedures for recognizing claims and evidence as itself – the law, and identifying the events that are being urged and proved as lying outside of the law. So the first sense in which there is an outside and an inside is the boundary that a system constantly creates, for itself, by generating self and hetero-references using its own communications. The second sense in which one can have an inside or outside is when one observes the communications of a system (both the self and the hetero-references) and acknowledges that this is not the manner in which that system and its environment would be described through the communications of another system. To give an example of these two kinds of inside/outside distinctions, consider how the legal system routinely utilizes science as evidence. When this occurs, the legal system does not regard science as part of law just because it has relevance to law. Within the legal system, within discussion of evidence, it will be the norms that establish

[31] ' … the system always reproduces a double reference: the distinction between self-reference and other-reference' (Luhmann 2012: 53).

relevance that are treated as law, whilst the science is external to law. This is the first kind of inside/outside. By contrast to this, a scientist observing on the manner in which the legal system uses science, might well claim that what the law treats as science is not really science at all. This is the second sense of being outside of the legal system.

It is this second version of being inside or outside a system that comes closest to the debate, within much legal philosophy, on whether the existence of law depends on some insider, or participant's perspective. This is usually addressed in terms of the insider's understanding of, and commitment to, the law, with debate on whether the object of this insider attitude is rules, norms, principles, etc. As such, it is typically focused on the legal system's self-reference, tending to ignore hetero-reference. In his call for a more sociologically informed jurisprudence, Roger is alert to this hetero-reference: the manner in which law forms its own version of society.[32] This is clearest in his discussion of the common law, where he is acknowledges that common lawyers looked out at society 'through the lenses of the common law' (2003: 32) i.e. they formed a view of society in the course of legal operations. As with the paradox of adjudication, systems theory indicates that the internal attitude, or participant's perspective, is not something located in the psyche of individuals, but in the system itself.

The idea of a perspective being located within a system, rather than it being an attribute of the human beings whose voices or bodily movements are interpreted as the utterances by that system, is difficult to grasp. But an example may make clearer what this involves.[33] The communications which are used in law to reach decisions and execute operations typically take a normative form. This normative form will have an implicit meaning that the person who is identified as speaker or writer

[32] In the preface to the first edition of *PoJ*, Roger declares an intention to bring 'to light assumptions contained within [legal philosophy] about the social, political and professional environment of law' (1989: viii, 2003: vi); and in the first chapter entitled 'Legal Philosophy in Context' he argues that 'because "the legal" can never be totally separated from such matters which normative legal theory often treats as external to law, the theory itself often implies interesting ideas about the very social context with it apparently seeks to exclude from its concerns … these ideas … often reveal basic presuppositions on which normative legal theory is based' (2003: 18). Though in our view, the focus here should be on the assumptions which law has about its environment, rather than the assumptions which philosophy makes when seeking to describe law.

[33] This example is developed more fully in Nobles and Schiff 2009.

has a normative commitment towards law. This does not mean that the person in question has any such commitment, in the sense of some psychic identification with law as an appropriate configuration of 'oughts'. It is just that legal operations (claims, legal arguments, legal judgements, etc.) cannot be executed without using communications whose implicit meaning includes this commitment. (This is the experience which makes the political radical on trial refuse to recognize the court or participate in the proceedings. Attempts to affect communications within the legal system constitute an implicit affirmation of commitment to the normativity of the system of which the communication forms a part).[34] Law can be described in a non-committed fashion when one is not seeking to execute legal operations, even by lawyers. And there are some legal operations, such as the giving of advice to clients, which can be presented though communications that are only predictive or instrumental (the so-called 'bad man' approach to law). But this kind of communication will not execute a valid judgement, or make an effective legal argument.

If the perspective of an insider is understood to be the meaning of the communications that construct the legal system – communications whose meanings which identify the relevant human beings as speakers and attribute normative commitments to them – then we can see that the insider perspective is not limited to lawyers. It is a feature of legal communications involving lay people too. Any person who is understood to make a legal claim – 'don't park there, it's a double yellow line' is an insider in the sense that the communications that they are understood to have made contain an implicit endorsement by them of the normativity of the legal system.[35] On the same basis, a judge whose diaries proclaim that they made legal judgements on the grounds of their strongly held personal views, or even bribes, is not an insider. These communications do not execute legal operations (though they may later trigger appeals by being recognized by the legal system as evidence of impropriety). Instead of looking at who is communicating – which kind of human being is involved – we move to focus on the communications themselves – what communications are in play here? This approach not only sharpens our sense of what is involved in internal attitudes, but also points to a

[34] While the law remains deaf to communications which challenge or fail to recognize its right to determine what it identifies as the legal issues. See Chistodoulidis 1998: 175–6 discussing the Baader-Meinhof proceedings.

[35] See Nobles and Schiff (2013a: 34–46).

wider, less exclusively judge or lawyer centred understanding of what constitutes the legal within society.

At this point we can return to consider how one might tackle the first of Roger's three questions about the relevance of legal philosophy to legal practice: what practical relevance in professional and political arenas of law does normative legal theory have? In *PoJ* the focus is on the possibility that particular theories might serve to present the legal profession in such a way as to increase the political support that it might receive, or the fees which it might charge. But we propose taking this question more literally, and asking what work jurisprudence (in the sense of broad statements about law at its most general) does *within* the legal system. The distinction which we wish to draw is between jurisprudence as self-description, and jurisprudence as legal philosophy. Jurisprudence as legal philosophy, with its concern with what is most general about the legal system, adopts structures similar to the system which it is seeking to describe. It tends towards abstraction, seeking to identify what is general rather than what is particular. In so doing, it replicates the increased generality that is involved in the process of secondary observation, and in turn, self-description. Self-description, in law as in other social systems, does important work in establishing and maintaining a system's identity. But the criteria and restrictions as to what, within philosophy, represents an acceptable description of a system are not the same features that establish what, within a system, is generated as its self-description. The example of common law self-description and its displacement by positivist self-descriptions suggests that a system does not readily alter its self-description in response to external critique. Self-descriptions are generated within a system by the operations which that self-description facilitates, and they are re-affirmed by those same operations. If the operations change, then the self-descriptions that they generate can be expected to alter, as occurred within the legal system with the changing nature and volume of legislation. This is a reflexive relationship, in the sense that what is being created by law's operations (its self-description) is in turn stabilizing (by restricting the possibilities) of what constitutes law's operations. Law is cognitively open, at the level of self-description as at any other level. This means it can adopt communications from its environment. It must therefore be open to legal philosophy as a source of

communications that could facilitate its operations. But this also means that it remains closed to communications from the outside that would paralyze its operations.

Applying this systems theory approach, one can see that legal theories which have equal degrees of logical coherence and philosophical respectability may have quite different possibilities for having a second existence (second coding) within the legal system. At what point within the legal system could one introduce a deconstructionist argument, or the more extreme forms of realist arguments?[36] Adjudication cannot be executed by claiming that law is what the judges say it is, or that everything could be different, for such communications provide no basis for the kinds of inter-connected communications that are legal arguments. The same applies to empirical observations on the influence of class, race or gender on legal decisions. Whatever the nature of these causal factors, they cannot operate within law as communications which explain the law to itself, in the course of its own operations. Any judge who is 'honest' enough to admit in the course of their judgements their decision on a case is the result of their class, gender or race is not offering a communication which fits with those which will have established the legal issues before them. How can such judges articulate their judgements as the product of their class, race, gender or self-interest without attributing the same meanings to the precedents cited to them? And how are such judges to decide the issues in question, if the communications that construct their judgements affirm that other judges who come from a different class, or gender, would decide the matter differently? However much these social factors may influence legal decisions, they cannot be internalized within them, without interrupting the ability of law routinely to construct issues, decide cases and execute its other operations. And if they cannot form part of law's self-observations, they cannot in turn form its self-descriptions.

Similar considerations are relevant to the law's construction of itself as a unity. Rather than trying to form a judgement on the extent to which law is, or is not, deserving of this description, or attributing its retention to the self-interest of legal professionals, one can examine the role played by this self-description within the operations of law. Our answer is informed by long historical

[36] See Nobles and Schiff 2006: chapter 6 'Law's Politics: Criticising Critical Legal Studies'.

circumstances, going back to the re-discovery of Roman law in the eleventh century.[37] The assumption that law is a unity and that its parts were systematically inter-related in a manner that can be elucidated through arguments of practical reasoning marked the beginning of the development of legal communications as institutionalized doctrine. As a set of implicit meanings, they are re-affirmed in every attempt by lawyers to contextualize any legal issue within any wider set of legal propositions. The 'truth' (if one can talk of such a thing) that legal communications do not deserve such a self-description will not stop the forms of argumentation which implicitly affirm such self-descriptions, or at least not until forms of inter-connection evolve which dispense with the need for such implicit meanings.

These observations have implications for some of the claims made in *PoJ* about the possibilities for law to become less unified. It is one thing to say that lower courts develop different interpretations of legal provisions from higher courts, or that the police frequently develop interpretations that differ from those of lawyers. But it is quite another to claim that these differences of interpretation can themselves form part of the communications which occur – i.e. that they can become self-conscious communications. And where they cannot, as when a judge or advocate cannot articulate that their own race or gender as the basis of their interpretation, then these factors, however much they may influence the actors' attempts to communicate, will not form part of the legal system. The legal system will continue to carry out its operations through communications that fail to recognize these factors. To borrow and develop some of Brian Leiter's writings on legal realism, one can have legal reasons, and non-legal reasons. Some of these non-legal reasons may be capable of forming communications within the system, and offer possibilities for connections to further communications. Examples of these might be the judges' presentations of the justice of the cases before them. But other kinds of non-legal reasons may not be able to form communications within the system at all – or not without undoing the operations which the actors are hoping to induce. Thus judges who attribute their decisions to their own race, class or subjective experiences are likely to be interpreted, within the legal system, as having made errors, due to bias. These kinds of factors may be

[37] Watson 1991, Stein 1999.

shown, through other kinds of observation (such as statistical analysis) to make a clear and consistent difference to the reaching of particular classes of decisions. But if they cannot themselves form the subject of communications then they will not simply be non-legal in the sense that the legal system itself identifies them as something, in addition to its formal norms, that can make a difference to a decision. These reasons will be non-legal in a much stronger sense: that they are excluded from the legal system.

In offering systems theory as a sociological approach for investigating the role played by jurisprudence within the legal system we wish to end by saying something about the role of humans, for we suspect that the manner in which this theory de-centres the role of the human actor, is the source of at least some of the resistance which it has generated within the sociology of law (including the resistance presented by Roger in *PoJ*). From the perspective of this theory, human beings are not part of the legal system. This follows from a larger and even more shocking assertion that human beings lie outside of society. For systems theory, society consists of communications, for only these, rather than human thoughts (consciousness) or the internal biological or chemical states of particular human beings, have a social existence. The biology, chemistry or consciousness of human beings can become social as subjects and objectives of (and therefore within) communication. But so can stars and planets, which are accepted to lie outside of society. To quote the title of a recent book by Michael King, *Systems, not People, Make Society Happen*. But this understanding of humans as outside of society, does not lead to an indifference to human beings in our understanding of society. First, systems theory does not exclude most of what is attributed, within sociology, to the human actor. Beliefs, conventions, norms and intentions are observable, but they are only observable, as communication.[38] Second, society and law as part of society, requires the involvement of humans. Unless humans are motivated to seek what operations achieve the necessary communications do not

[38] A communication is a unit of meaning within society, and as such, includes not only language but symbols and gestures. A thought is a unit of meaning within consciousness. The possibility of meaning having two existences, within communication and within thought, makes society possible.

occur.[39] Conversely, where humans are motivated to seek the operations of a system, communication will continue, despite theories that suggest that the communications which affect those operations are groundless, paradoxical, etc. Which, returning to our discussion of *PoJ*, tells us something about the potential of philosophical critique to alter the operations of law, or any other social system.

Bibliography

Aquinas. 1959. *Selected Political Writings*. Oxford, Blackwell. Trans J.G. Dawson, ed. A.P. D'Entreves.

Austin, J. 1955. *The Province of Jurisprudence Determined*. London, Weidenfeld and Nicolson. Reprint of original dated 1832.

Baker, J. 2002. *An Introduction to English Legal History*. Oxford, Oxford University Press. 4th edition.

Bentham, J. 1843. 'Principles of Judicial Procedure'. In J. Bowring (ed.) *The Works of Jeremy Bentham*, Volume 2. Edinburgh, William Tait.

Borch, C. 2011. *Niklas Luhmann*. Oxford, Routledge.

Christodoulidis, E. 1998. *Law and Reflexive Politics*. Dordrecht, Kluwer.

Coke, E. 1628. *First Institute of the Laws of England*. Rep. New York, Garland Publishing Company, 1979.

Coleman, J. and Shapiro, S. (eds) 2002. *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Oxford, Oxford University Press.

Cotterrell, R. 1975. 'Direction and Development in Anglo-American Jurisprudence and Sociology of Law.' 4 *Anglo-American Law Review*, 386–411.

Cotterrell, R. 1983. 'The Sociological Concept of Law.' 10 *Journal of Law and Society*, 241–55.

Cotterrell, R. 1989. *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*. London, Butterworths.

[39] Whilst the execution of legal operations is something that lawyers are motivated to effect by the material rewards which result, these still would not occur if they failed to motivate their clients – so this is always more than a matter of lawyers' self-interest.

Cotterrell, R. 1993. ‘Sociological Perspectives on Legal Closure.’ In A. Norrie (ed.) *Closure and Critique*. Edinburgh, Edinburgh University Press. ch.10, 175–93.

Cotterrell, R. 1995. *Laws Community: Legal Theory in Sociological Perspective*. Oxford, Oxford University Press.

Cotterrell, R. 1998. ‘Why Must Legal Ideas Be Interpreted Sociologically?’ 25 *Journal of Law and Society*, 171–92.

Cotterrell, R. 2001. ‘The Representation of Law’s Autonomy in Autopoiesis Theory.’ In J. Priban and D. Nelken (eds) *Law’s New Boundaries*. Aldershot, Dartmouth. ch. 4, 80–103.

Cotterrell, R. 2002. ‘Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies.’ 29 *Journal of Law and Society*, 632–44.

Cotterrell, R. 2003. *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*. 2nd edn. London, Lexis Nexis/Butterworths, and Oxford, Oxford University Press.

Cotterrell, R. 2008. ‘Transnational Communities and the Concept of Law’. 21 *Ratio Juris*, 1–18.

Cotterrell, R. 2009. ‘Spectres of Transnationalism: Changing Terrains of Sociology of Law’. 36 *Journal of Law and Society*, 481–500.

Cotterrell, R. 2013a. ‘The Role of the Jurist: Reflections around Radbruch.’ 26(4) *Ratio Juris*, 510–22.

Cotterrell, Roger. 2013b. ‘The Jurist’s Conscience: Reflections around Radbruch’. In M. Del Mar and C. Michelon (eds.) *The Anxiety of the Jurist*. Aldershot, Ashgate. Ch. 2, 13–26.

Cotterrell, R. 2014a. ‘Why Jurisprudence is not Legal Philosophy’. 5/1 *Jurisprudence*, 1–19.

Cotterrell, R. 2014b. ‘Professing Jurisprudence’. In *Law and Michael Freeman*. Oxford, Oxford University Press.

Dworkin, R. 1986. *Laws Empire*. London, Fontana.

Febbrajo, A. and Haste, G. (eds) 2013. *Law and Intersystemic Communication: Understanding ‘Structural Coupling’*. Aldershot, Ashgate.

Fuller, L. 1964. *The Morality of Law*. New Haven, Yale University Press.

Hart, H.L.A. 1961/1994. *The Concept of Law*. Oxford, Clarendon Press.

Hobbes, T. 1681. *A Dialogue between a Philosopher and a Student of the Common Laws of England*. Chicago, Chicago University Press. Ed. J. Cropsey. 1971.

Kairys, D. (ed.) 1998. *The Politics of Law: a progressive critique*. New York, Basic Books, 3rd edition.

Kelsen, H. 1967. *Pure Theory of Law*. Berkeley, University of California Press, trans. M. Knight, 2nd edition.

King, M, 2009. *Systems, Not People, Make Society Happen*. Holcombe, e-publishing.

Lobban, M. 1991. *The Common Law and English Jurisprudence 1760-1860*. Oxford, Clarendon Press.

Leiter, B. 2007. *Naturalizing Jurisprudence*: *Essays on American Realism and Naturalism in Legal Philosophy*. Oxford, Oxford University Press.

Luhmann, N. 1982. *The Differentiation of Society*. New York, Columbia University Press, trans. S. Holmes and C. Larmore.

Luhmann, N. 1995. *Social Systems*. Stanford, Stanford University Press, trans. J. Bednarz Jr.

Luhmann, N. 1998. *Observations on Modernity*. Stanford, Stanford University Press, trans. W. Whobrey.

Luhmann, N. 2000. 'Answering the Question: What is Modernity? An Interview with Niklas Luhmann'. In Rasch, W. *Niklas Luhmann's Modernity: The Paradoxes of Differentiation.* Stanford, Stanford University Press. 195–221.

Luhmann, N. 2005. 'The Concept of Autopoesis.' In D. Seidl and K.H. Becker (eds) *Niklas Luhmann and Organisational Studies.* Copenhagen, Copenhagen Business School Press. Ch. 2, 54–63.

Luhmann, N. 2004. *Law as a Social System*. Oxford, Oxford University Press, trans. K.A. Ziegert, eds. F. Kastner, R. Nobles, D. Schiff, K. Ziegert.

Luhmann, N. 2012. *Theory of Society*, Volume I. Stanford, Stanford University Press, trans. R. Barrett.

Luhmann, N. 2013. *Theory of Society*, Volume 2. Stanford, Stanford University Press, trans. R. Barrett.

Maine, Sir Henry. 1861. *Ancient Law*. London, Dent, 1917 edition.

McIlwain, C. 1910. *The High Court of Parliament and its Supremacy: An Historical Essay on the Boundaries between Legislation and Adjudication in England*. New Haven, Yale University Press.

Nobles, R. and Schiff, D. 2000. *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis*. Oxford, Oxford University Press.

Nobles, R. and Schiff, D. 2004. 'A Story of Miscarriage: Law in the Media', 31 *Journal of Law and Society*, 221–44.

Nobles, R. and Schiff, D. 2006. *A Sociology of Jurisprudence*. Oxford, Hart.

Nobles, R. and Schiff, D. 2009. 'Why Do Judges Talk the Way They Do?' 5.1 *International Journal of Law in Context*, 25–49.

Nobles, R. and Schiff, D. 2012. 'Using Systems Theory to Study Legal Pluralism: What Could Be Gained?' 46 *Law and Society Review*, 265–96.

Nobles, R. and Schiff, D. 2013a. *Observing Law through Systems Theory*. Oxford, Hart.

Nobles, R. and Schiff, D. 2013b. 'Structural Coupling between the Systems of Law and the Media: The Contrasting Examples of Criminal Conviction and Criminal Appeal'. In A. Febbrajo and G. Harste (eds) 2013. *Law and Intersystemic Communication: Understanding 'Structural Coupling'*. Aldershot, Ashgate. ch. 13, 317–25.

Perez, O. and Teubner, G. (eds) 2006. *Paradoxes and Inconsistencies in the Law*. Oxford, Hart.

Postema, G. 2002. 'Philosophy of the Common Law'. In J. Coleman and S. Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Oxford, Oxford University Press. ch. 15, 588–622.

Raz, J. (2009) *The Authority of Law: Essays on Law and Morality*. Oxford, Oxford University Press. 2nd edition.

Seidl, D. and Becker, K.H. (eds) 2005. *Niklas Luhmann and Organisational Studies*. Copenhagen, Copenhagen Business School Press.

Simpson, A.W.B. 1986. 'The Common Law and Legal Theory', In W. Twining (ed.) *Legal Theory and Common Law*. Oxford, Blackwell, 8–25.

Stein, P. 1999. *Roman Law in European History*. Cambridge, Cambridge University Press.

Stoner, J.R. Jnr. 1992. *Common Law and Liberal Theory: Coke, Hobbes and the Origins of American Constitutionalism*. Lawrence, KA, University of Kansas Press.

Teubner, G. 1993. *Law as an Autopoietic System*. Oxford, Oxford University Press. Trans. A. Bankowska and R. Adler.

Thornhill, C. 2011. *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical Sociological Perspective*. Cambridge, Cambridge University Press.

Twining, W. 1986. (ed.) *Legal Theory and the Common Law*. Oxford, Blackwell.

Watson, A. 1991. *Roman Law and Comparative Law*. Athens, Georgia, University of Georgia Press.